

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Communications Assistance)
for Law Enforcement Act)

CC Docket No. 97-213

1998
FCC FILE NO. **REPLY**

BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., BellSouth Personal Communications, Inc., and BellSouth Wireless Data, L.P., on behalf of themselves and their affiliated companies, by counsel ("BellSouth"), reply to the comments filed by the Federal Bureau of Investigation and U. S. Department of Justice (FBI/DOJ) and Bell Emergis – Intelligent Signaling Technologies (Bell Emergis) filed in this docket on May 8, 1998.

I. CALEA AUTHORIZES BLANKET EXTENSIONS

Section 107 of the Communications Assistance for Law Enforcement Act (CALEA) clearly authorizes the Commission to grant one or more extensions of the Section 103 compliance date to any carrier.¹ In this instance, where the circumstance that justifies an extension, the unavailability of CALEA-compliant equipment and software, applies equally to all carriers, and many carriers have already petitioned for an extension, the Commission can, and should, grant a blanket extension. FBI/DOJ, relying on an unreasonable reading of the statute, claim that the Commission lacks the authority to take such action. Indeed, the FBI/DOJ argues that the use of the indefinite article *a* followed by multiple determinative *the* in

¹47 U.S.C. § 1006(c).

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connection with the singular form of the noun *carrier* in Section 107(c)² demonstrates that Congress did not intend for the Commission to grant industry wide extensions of the Section 103 compliance date.³ The FBI warns that the reasonable grammatical construction proposed by virtually every other party submitting comments in this docket would, of course, lead to disaster "from the perspective of law enforcement's ability to protect the public from criminal activity, particularly in the areas of organized crime, drug trafficking, violent crime, and domestic terrorism."⁴ The Commission should reject the FBI/DOJ's strained reading of the statute, disregard the histrionics, and grant the blanket relief requested by every telecommunications carrier filing comments and petitions herein.

BellSouth, and every other responsible carrier, are well aware of the serious threat to the public peace posed by organized crime, illegal drugs, violence and terrorism. BellSouth and every other responsible carrier will continue to abide by the law and cooperate with law enforcement officials in assisting with properly authorized electronic surveillances of suspected criminal activity, regardless of the outcome of this proceeding:

Granting an extension does not mean that carriers will not have the ability to perform wiretaps during the extension period. All carriers currently provide technical assistance to law enforcement to conduct lawfully authorized wiretaps, whether digital or analogue, wireless or wireline. The vast majority of these wiretaps are carried out without impediment. CALEA solutions will result in advanced features being available for wiretapping in addition to the basic surveillance already being conducted. Thus, granting an extension does not mean that electronic surveillance will come to a standstill.⁵

² 47 U.S.C. § 1006(c)(1) ("A telecommunications carrier . . . may petition the Commission . . .") (emphasis added).

³ FBI/DOJ Comments at 12-13.

⁴ FBI/DOJ Comments at 11.

⁵ Comments of the Cellular Telecommunications Industry Association (CTIA) at 2. See also Comments of Aliant Communications, Inc. at 1 ("Until CALEA is implemented, Aliant will continue to cooperate and provide the capability to execute wiretapping requests in a reasonably achievable and cost effective manner"); Comments of Powertel, Inc. at 4.

The FBI/DOJ is disingenuous in positing public harm if the FCC were to explicitly recognize two facts which FBI/DOJ have already separately conceded to Congress and to the Commission. First, a complete switch based solution for CALEA compliance will not be available before the year 2000.⁶ Second, as a result of the unavailability, there is a demonstrated need for an extension of the Section 103 compliance date.⁷

FBI/DOJ's assertion that the petitions on which the Commission has requested comments identify no provision of CALEA authorizing the Commission to create industry-wide alterations of Section 103's effective date⁸ is succinctly rebutted by Ameritech: nothing in the language of Section 107 prohibits the Commission from granting a blanket extension of time.⁹ Further anticipating the FBI's crabbed interpretation of Section 107's grammar, Ameritech correctly notes:

Although the language is written in the singular, the Commission has the authority to recognize that the information applies to all carriers equally.¹⁰

The comments of every party (except, of course, FBI/DOJ and Bell Emergis) demonstrate with singular unanimity that compliance with the assistance capability requirements under Section 103 of CALEA is not reasonably achievable through application of technology available within the current compliance period. Because the Commission clearly has the authority to grant an

("Members of the wireless industry are committed to continuing to provide law enforcement—pursuant to legal authorization—with the assistance capabilities present in their networks").

⁶ Comments of the United States Telephone Association (USTA) at 3, n.7.

⁷ Comments of the Telecommunications Industry Association (TIA) at 10, n.27. Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) at 5.

⁸ FBI/DOJ Comments at 11.

⁹ Comments of Ameritech at 4, n.4.

¹⁰ *Id.*

extension for any one carrier to whom such facts apply, it must by necessity have the authority to grant an extension to all such carriers to whom such facts apply.

It is clearly reasonable and in the public interest for this agency to manage its work as efficiently as it can. Airtouch and USTA correctly cite to recent Commission action in other dockets where blanket waivers were used by the Commission to prevent the expenditure of considerable agency resources continually revisiting issues already examined in prior and nearly identical petitions.¹¹ Section 107(b) supplies the Commission with ample authority to suspend the compliance deadline for all carriers:

Section 107(b) contemplates an industry-wide extension when a person challenges an *industry* standard. Congress was well aware that the modern telecommunications industry has been built on standards and sought to ensure that those most affected by CALEA had the primary role in designing the solution.¹²

Comments also demonstrate additional express authority within CALEA itself for the Commission's grant of a blanket extension.¹³

An individual unfamiliar with this docket, upon reading the FBI/DOJ comments in isolation, might conclude that the telecommunications industry has delayed the standards setting process and is attempting to get the Commission to add additional provisions to CALEA

¹¹ Airtouch Comments at 8, n.24, 9; CTIA Comments at 14, nn.21 & 22; USTA Comments at 5-6.

¹² CTIA Comments at 13-14 (emphasis in original, footnotes omitted). *See also* Comments of AT&T Corp at 6-7; Comments of Bell Atlantic Mobile at 5-6; Comments of 360° Communications Company at 9-10; TIA Comments at 6-7; Comments of the Center for Democracy and Technology (CDT) at 6, n.10.

¹³ *See, e.g.*, USTA Comments at 4-5; Comments of Omnipoint Communications at 5-6. Because there is no statutory prohibition against a blanket extension, because the Commission clearly has authority pursuant to CALEA to grant extensions and to manage its affairs as efficiently as is in the public interest, it is unnecessary to rely on authority outside of CALEA, specifically Section 4(i) of the Communications Act, as advocated by TIA (Comments at 4), AT&T (Comments at n.22) and Omnipoint (Comments at 6).

and otherwise “override Congress’s deadline for compliance.”¹⁴ The record in this proceeding overwhelmingly demonstrates the opposite. The industry’s good faith compliance efforts and the history of its implementation of CALEA, despite delays occasioned by the FBI, are chronicled in detail by TIA, which makes clear that the industry’s efforts have been hampered at practically every step of the process by the FBI.¹⁵

Section 107 of CALEA clearly confers permissive authority on the Commission to grant extensions to one or more carriers if the Commission determines that compliance with the assistance capability requirements is not reasonably achievable through application of technology available within the compliance period. Exercise of this authority cannot possibly be held to be an “override” of a Congressional deadline.¹⁶ Moreover, the FBI/DOJ is poorly positioned to complain if the Commission exercises its express statutory authority to grant a blanket extension. Section 104 conferred a mandatory obligation on the Attorney General to publish a maximum capacity notice on October 25, 1995.¹⁷ This the Attorney General did not do, thus in this context, unilaterally “overriding Congress’s deadline for compliance” for a period of almost three years. Indeed, this three year delay by the FBI/DOJ has contributed to the unavailability of a CALEA-complaint solution.¹⁸

The FBI/DOJ’s proposed “mechanism of forbearance agreements” should not be considered as a rational alternative to a blanket extension, or other streamlined extension

¹⁴FBI/DOJ Comments at 20.

¹⁵ TIA Comments at pp. 14-18.

¹⁶ Additionally, GTE requests that the FCC address Congress and propose a new, more reasonable deadline. Comments of GTE at 7.

¹⁷ 47 U.S.C. § 1003 (c).

¹⁸ TIA Comments at 12.

alternative.¹⁹ The FBI has been unsuccessful to date in forcing its extra-statutory "punch-list" upon manufactured and telecommunications carriers through such proposed contracts of adhesion. These tactics have only unreasonably delayed and undermined the ability of carriers to achieve CALEA compliance as originally envisioned by Congress. FBI/DOJ may be successful in coercing some carriers into entering into what are, in effect, individual consent decrees in order to obtain its punch-list with the bludgeon of threatened enforcement action before the Commission can decide the pending deficiency petitions. The Commission, however, should remain focused on the uncontroverted facts in the record of this proceeding: compliance is not reasonably achievable by October 25, 1998 for any carrier because CALEA compliant technology is not now available to any carrier. This determination, by express statutory authority, provides the basis for a reasonable and simple blanket extension of the October 25, 1998 compliance date.

II. THE COMMISSION SHOULD DISREGARD BELL EMERGIS

The Commission should recognize the basis for Bell Emergis' advocacy: it hopes to make a lot of money off of telecommunications carriers over whom the sword of non-compliance and potential enforcement action hang. Bell Emergis' comments are hopelessly vague in their purported offering of a timely solution. They raise the possibility of using a product (presumably proprietary to Bell Emergis) as a "network-based solution" that would negate the need for a substantial extension to the compliance date.²⁰ Bell Emergis states that "the focus of the CALEA technical standard should be broadened to allow network-based

¹⁹ See, e.g., AT&T Comments at 6, n.17.

²⁰ Bell Emergis Comments at 3.

solutions".²¹ In fact, J-STD-025 does not differentiate between network-based solutions and switch-based solutions, being fundamentally an interface standard that defines the interface between a network and a law enforcement collection site. If a network-based solution can provide the information to be passed over the interface, the standard can support it.

Bell Emergis further states that it has demonstrated its device to the FBI in significant detail,²² and that the network-based solution will "facilitate a stop-gap measure with the added ability of being able to be extended to full network and feature compliancy."²³ BellSouth is unaware of any statement by the FBI, or any other law enforcement agency, that the Bell Emergis product was evaluated and determined to be a means to achieve compliance with CALEA. The only public record on this subject is Ameritech's statement that, after its evaluation, it concluded that "Bell Emergis' network-based solution had significant technical problems that would require substantial modification before it could operate with the existing network and be compliant with CALEA."²⁴ A network-based solution is simply not a viable option as a "stop-gap" measure to alleviate the need for a compliance date extension. The cost estimates that BellSouth has been provided for deployment of a network-based solution (without one or more extensions of uncertain length that are alluded to by Bell Emergis in order to extend the capability to full network and feature compliancy) exceed the \$500 million authorized to be appropriated by Congress. If a network solution were deployed as a "stop-gap," it would be technically difficult and very expensive to migrate to a different architecture if a different architecture is required in order to be fully CALEA compliant. Rather than

²¹ *Id.* at 2.

²² *Id.* at 3.

²³ *Id.* at 4.

²⁴ Ameritech Comments at 7-8.

looking for a "stop-gap," it would be prudent to wait until requirements are stable before committing the limited financial and work force resources available to a specific network architecture.²⁵ In any event, even Bell Emergis admits that it will have no CALEA-compliant solution available by the October due date, so an extension is clearly warranted.

III. THE COMMISSION SHOULD NOT GRANT A LIMITED EXTENSION TO PROCEED WITH DEVELOPMENT WHILE THE PUNCH-LIST ITEMS ARE IN DISPUTE

BellSouth supports AT&T and CTIA's opposition to the FBI/DOJ bifurcated approach to an extension, i.e., that the Commission grant a limited extension for industry to proceed with development of J-STD-025 while the punch list items are evaluated by the Commission.²⁶ At best, a bifurcated approach will cause vendors to "dedicate engineers and resources twice to the same project,"²⁷ and at worst could generate modifications to requirements that would necessitate a fundamental design change, thus negating a substantial design effort and, in either case, substantially increase the cost of a surveillance feature.

FBI/DOJ argue that "forbearance agreements should make unnecessary any wave of extension petitions to the Commission, by enabling any manufacturer (and the carrier it serves) that expects to be unable to meet Section 103's October 25, 1998 deadline to negotiate a reasonable time for compliance with the Department of Justice and the FBI on an individual basis."²⁸ These forbearance agreements are problematic in that law enforcement insists that

²⁵ Cf. *Telephone Number Portability*, 11 FCC Rcd 8352, 8405-8413 (1996) (declining to require "medium-term" or short-term database solution because increased costs are unwarranted given imminent implementation of long-term solution)

²⁶ AT&T Comments at 8; CTIA Comments at 10.

²⁷ AT&T Comments at 8.

²⁸ FBI/DOJ Comments at 19.

manufacturers provide an indication that they will support all capabilities, including the punch list items and the location and packet data issues contested by the CDT. This has the affect of circumventing the public process intended by Congress, and forcing the implementation of capabilities without any input from industry. Such an approach violates Section 103(b) which precludes the FBI from requiring, or prohibiting the adoption of, any specific design of equipment, features or services by the industry.²⁹

FBI/DOJ also argue that an accepted standard is not a requirement, and that suppliers are required to develop solutions by October, 1998 regardless of the stability of a standard. BellSouth supports TIA's position that this "would risk having industry participants develop non-uniform solutions to CALEA."³⁰ Developing and deploying non-standard solutions, and later replacing them with standard ones would pose interoperability problems and would greatly increase the ultimate cost of the capability.

Finally, OPASTCO discusses the FBI's incorrect and misguided interpretation of "installed" and "deployed" and asks the Commission to add an additional factor "the extent to which equipment, facilities, and services were deployed prior to the commercial availability of CALEA-compliant solutions."³¹ BellSouth supports OPASTCO's position.

CONCLUSION

The record in this proceeding demonstrates that a general extension of the CALEA Compliance Date, applicable to all carriers, is warranted. The Commission has the authority to

²⁹ 47 U.S.C. § 1006(b).

³⁰ TIA Comments at 11.

³¹ OPASTCO Comments at 9. *See also CTIA and PCIA v. Janet Reno; U.S. Department of Justice; Louis J. Freeh; and FBI* 1:98CV01036 (D.D.C. filed April 27, 1998).

grant such blanket extension, and it should grant such an extension. In the alternative, the Commission should adopt the streamlined certification process proposed by AT&T, or grant BellSouth and its affiliated companies an extension of the CALEA Compliance Date until October 25, 2000, with leave to seek additional extensions under Section 103 as may be warranted and demonstrated as necessary to fully comply with CALEA in a cost effective fashion.

Respectfully submitted,

BELLSOUTH CORPORATION

By:

M. Robert Sutherland
Theodore R. Kingsley
Suite 1700 - 1155 Peachtree Street, N.E.
Atlanta, GA 3030-3610
(404) 249-3392

BELLSOUTH TELECOMMUNICATIONS, INC.

By:

J. Lloyd Nault, II
4300 BellSouth Center
675 West Peachtree Street, N. E.
Atlanta, GA 30375
(404) 335-0737

BELLSOUTH CELLULAR CORP.

By:

Michael P. Goggins
Suite 910 - 1100 Peachtree St., N.E.
Atlanta, GA 30309-4599
(404) 249-0919

BELLSOUTH PERSONAL
COMMUNICATIONS, INC.

By:

Charles M. Nalbome
Suite 400 - 3353 Peachtree Road, N.E.
Atlanta, GA 30326
(404) 841-2017

BELLSOUTH WIRELESS DATA, L.P.

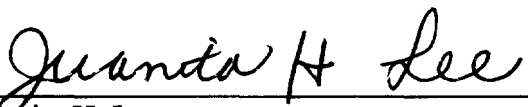
By:

Michael W. White
10 Woodbridge Center Drive, 4th Floor
Woodbridge, NJ 07095-1106
(732) 602-5453

Date: May 15, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of May 1998, serviced all parties to this action with the foregoing REPLY COMMENTS, reference docket CC 97-213, by hand service or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.



Juanita H. Lee

Service List CC 97-213

Kevin C. Gallagher, Sr. VP – General Counsel
and Secretary
360° Communications Company
8725 W. Higgins Road
Chicago, IL 60631

Pamela J. Riley
David A. Gross
Attorneys for AirTouch Communications, Inc.
1818 N Street, N.W.
Suite 320 South
Washington, DC 20036

Michael W. Mowery
AirTouch Communications, Inc.
2999 Oak Road, MS1025
Walnut Creek, CA 95596

Elaine Carpenter
Aliant Communications, Inc.
1440 M Street
Lincoln, NE 68508

Glenn S. Rabin
Federal Regulatory Counsel
ALLTEL Corporate Services, Inc.
655 15th Street, N.W.
Suite 220
Washington, DC 20005

Richard J. Metzger
Emily M. Williams
Attorneys For
Association for Local Telecommunications Services
888 17 Street, N.W. Suite 900
Washington, DC 20006

Barbara J. Kern, Counsel
Ameritech Corporation
4H74
2000 Ameritech Center Dr.
Hoffman Estates, IL 60196

Mark C. Rosenblum
Ava B. Kleinman
Seth S. Gross
Attorneys for AT&T Corporation
Room 3252F3 – 295 North Maple Avenue
Basking Ridge, NJ 07920

Douglas I. Brandon
AT&T Wireless Services
Fourth Floor
1150 Connecticut Avenue
Washington, DC 20036

John R. Scott, III
Crowell & Moring LLP
Attorneys for Bell Atlantic Mobile, Inc.
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Service List CC 97-213

Gerald W. Fikis, Group Leader Technology &
Business Line Management
Bell Emergis – Intelligent Signalling Technologies
Suite 412 – 78 O'Connor Street
Ottawa, ON Canada K1P 3A4

James X. Dempsey, Sr. Staff Counsel
Daniel J. Weitzner, Deputy Director
Center for Democracy and Technology
1634 Eye Street, N.W. – Suite 1100
Washington, DC 20006

Stewart A. Baker
Thomas M. Barba
James M. Talens
L. Benjamin Ederington
Attorneys for Telecommunications Industry Assn.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

ITS Inc.**
1919 M Street, N.W.
Room 246
Washington, DC 20554

James F. Ireland
Theresa A. Zeterberg
Cole, Raywid & Braverman, LLP
Attorneys for Centennial Cellular Corp.
1919 Pennsylvania Avenue, N.W. Suite 200
Washington, DC 20006

Martin L. Stern
Lisa A. Leventhal
Preston Gates Ellis & Rouvelas Meeds LLP
Attorneys for Center for Democracy & Technology
1735 New York Avenue, N.W., Suite 500
Washington, DC 20006

Michael Altschul, VP and General Counsel
Randall S. Coleman, VP Regulatory Policy & Law
Cellular Telecommunications Industry Assn.
1250 Connecticut Avenue, N.W., Suite 200
Washington, DC 20036

Susan W. Smith, Director External Affairs
CenturyTel Wireless, Inc.
3505 Summerhill Road
No. 4 Summer Place
Tomball, TX 75501

Louis J. Freeh, Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535

Larry R. Parkinson, General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, DC 20535

Service List CC 97-213

Honorable Janet Reno
Attorney General of the United States
U. S. Department of Justice
601 D Street, N.W., Room 9106
Washington, DC 20530

Stephen W. Preston
Deputy Assistant Attorney General
U. S. Department of Justice
601 D Street, N.W., Room 9106
Washington, DC 20530

Douglas N. Letter
Appellate Litigation Counsel
U. S. Department of Justice
601 D Street, N.W., Room 9106
Washington, DC 20530

Scott, R. McIntosh
Daniel Kaplan
Attorneys, Appellate Staff
Civil Division U. S. Department of Justice
601 D Street, N.W., Room 9106
Washington, DC 20530

David L. Sobel, Esq.
General Counsel
Electronic Privacy Information Center
666 Pennsylvania Avenue, S.E.
Suite 301
Washington, DC 20003

Steven Shapiro, Esq.
Legal Director
American Civil Liberties Union
125 Broad Street
New York, NY 10004

Barry Steinhardt, Esq.
President
Electronic Frontier Foundation
1550 Bryant Street
Suite 725
San Francisco, CA 94103

Kurt A. Wimmer, Esq.
Gerald J. Waldron, Esq.
Alane C. Weixel, Esq.
Coving & Burling
Attorneys for EPIC, EFF and the ACLU
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044-7566

John F. Raposa
Richard McKenna
GTE Service Corporation
600 Hidden Ridge, HQE03J36
P. O. Box 152092
Irving, TX 75015-2092

Andre J. Lachance
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, DC 20036

Service List CC 97-213

Catherine Wang
Swidler & Berlin Chtd.
Attorneys for ICG Telecom Group, Inc.
3000 K Street, N.W. – Suite 300
Washington, DC 20007

David L. Nace
B. Lynn F. Ratnavale
Lukas, Nace, Gutierrez & Sachs Chartered
Attorneys for Liberty Cellular, Inc., Bristol Bay
Cellular Partnership, BristolBay Telephone Coop., Inc.
And Norch Carolina RSA 3 Cellular Telephone Co.
1111 19th St., N.W. Suite 1200
Washington, DC 20036

L. Marie Guillory
Jill Canfield
Attorneys for National Telephone Cooperative Assn.
2626 Pennsylvania Avenue, N.W.
Washington, DC 20037

Robert S. Foosaner, VP and Chief Regulatory Officer
Lawrence R. Krevor, Director – Government Affairs
Laura L. Holloway, General Attorney
Nextel Communications, Inc.
1450 G Street, N.W., Suite 425
Washington, DC 20005

Stephen L. Goodman
William F. Maher, Jr.
Halprin, Temple, Goodman & Sugrue
Attorneys for Northern Telecom, Inc.
1100 New York Avenue, N.W.
Suite 650, East Tower
Washington, DC 20005

Frank X. Froncek
Of Counsel
Northern Telecom, Inc.
4001 East Chapel Hill – Nelson Highway
Research Triangle Park, NC 27709-3010

Emilio W. Cividanes
Piper & Marbury, L.L.P.
Attorneys for Omnipoint Communications, Inc.
1200 19th Street, N.W.
Washington, DC 20036

Lisa M. Zanaia, VP and General Counsel
Stuart Polikoff, Sr. Regulatory & Legislative Analyst
OPASTCO
21 Dupont Circle, N.W., Suite 700
Washington, DC 20036

Judith St. Ledger-Roty
Paul G. Madison
Kelley Drye & Warren LLP
Attorneys for Paging Network, Inc.
1200 19th Street, N.W., Suite 500
Washington, DC 20036

Eric W. DeSilva
Stephen J. Rosen
Wiley, Rein & Fielding
Attorneys for PCIA
1776 K Street NW
Washington, DC 20006

Service List CC 97-213

Mark J. Golden, Sr. VP Industry Affairs
Robert Hoggarth, Sr. VP Paging/Narrowband
Personal Communications Industry Association
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

Jill F. Dorsey
Vice President/General Counsel
Powertel, Inc.
1233 O.G. Skinner Drive
West Point, GA 31833

Joseph R. Assenzo, General Attorney
Sprint Spectrum L.P. d/b/a Sprint PCS
4900 Main Street, 12th Floor
Kansas City, MO 64112

Stewart A. Baker
Thomas M. Barba
L. Benjamin Ederington
Steptoe & Johnson LLP
Attorneyw for TIA
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Grant Seiffert, Director Government Relations
Matthew J. Flanigan, President
Telecommunications Industry Association
1201 Pennsylvania Avenue, N.W., Suite 315
Washington, DC 20004

Peter M. Connolly
Koteen & Naftalin LLP
Attorneys for United States Cellular Corporation
1150 Connecticut Avenue
Washington, DC 20036-4104

Mary McDermott
Linda Kent
Keith Townsend
Lawrence E. Sarjeant
United States Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005

James D. Ellis
Robert M. Lynch
Durward D. Dupre
Lucille M. Maates
Frank C. Magill
SBC Communications, Inc.
One Bell Plaza, Suite 3703
Dallas, TX 75202

Robert Vitanza
SBC Communications, Inc.
15660 Dallas Parkkway
Suite 1300
Dallas, TX 75248

Office of Secretary**
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554